UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

OAKWOOD HEALTHCARE, INC. and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,	Case	7-RC-22141
BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER and UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,	Cases	18-RC-16415 18-RC-16416
CROFT METALS, INC. and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITH, FORGERS AND HELPERS, AFL-CIO,	Case	15-RC-8393

BRIEF OF *AMICUS CURIAE*
COVENANT HEALTHCARE SYSTEM

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I. INTRODUCTION

Covenant Medical Center, Inc. d/b/a Covenant HealthCare System ("Covenant") is a Saginaw, Michigan full-service health care provider and acute care hospital with more than 700 beds, 400 physicians, and 3,700 employees.

On July 25, 2003, the National Labor Relations Board ("Board") invited the filing of briefs to address ten specific questions regarding the interpretation and application of the U.S. Supreme Court's decision in NLRB v. Kentucky River Community Care, 532

U.S. 706 (2001). Covenant HealthCare submits the following comments on the questions posed by the Board.

1. **What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? In particular, what is "the degree of discretion required for supervisory status," i.e., "what scope of discretion qualifies" (emphasis in original)? Kentucky River at 713. What definition, test, or factors should the Board consider in applying the term "independent judgment"?**

The Board should continue to define the term "independent judgment" in 2(11) with reference to the statutory definition. Congress did not use the term in isolation, but in conjunction with twelve enumerated functions exercised by one who qualifies as a supervisor. As the Board and Courts have long recognized, a supervisor need only exercise independent judgment with respect to any one of the twelve functions to qualify as a supervisor. Nonetheless, Congress required that "the exercise of [an enumerated supervisory] authority" must not be "merely routine or clerical in nature" but must "require[] the use of independent judgment." Thus, by the plain language of the statute, all independent judgments that are more than "routine or clerical" confer supervisory status.

In practice, this will be a fact intensive inquiry. In performing that inquiry, the Board's inquiry is more likely to produce predictable results if the Board focuses on the following factors:

- The policies or guidelines established by the employer with respect to the factor. Although a putative supervisor may appear to exercise judgment, the existence of detailed employer policies and guidelines, whether written or oral, may effectively bind a putative supervisor's hands. Where this is the case, an

individual is not a supervisor within the meaning of the Act. Classic cases that arise in this setting involve, for example, the application of policies on a strict seniority basis, or the application of first-in-first-out or similar policies with respect to assignments. The question for the Board to ask is whether the alleged supervisor has the authority to weigh factors not enumerated by established rules or guidelines to reach a decision, or in the alternative, whether factors frequently arise that cannot reasonably be anticipated in advance that the alleged supervisor is permitted to weigh and evaluate in reaching his or her decision and without referring the question to another more senior manager.

- The frequency or likelihood that the judgment is or will in fact be exercised. Although the Board has long recognized that a power does not have to be exercised frequently in order to qualify an employee as a supervisor, as a practical matter, the likelihood that a power will be exercised must be more than hypothetical.

- Any practice or employer requirement that the putative supervisor defer unusual circumstances or cases to another person. The exercise of judgment or discretion, by its nature, implies the power to decide or at least to effectively recommend. Where a part-time supervisor is required to defer non-routine matters to a more senior person, supervisory status as to that function is doubtful.

- Pre-existing job descriptions. Although job descriptions should not govern if they do not accurately reflect the reality of what occurs in the job place, they do give insights and clues into the functions and discretion management has vested in a

putative supervisor at a time when Board proceedings may not have been the primary issue in the drafter's mind.

- Reviews, disciplines and bonus plans applicable to the alleged supervisor. Particularly as it relates to directing the work of other employees, the reviews, discipline and bonuses an alleged supervisor may have received may provide important insights. As discussed below, a supervisor who directs the work of another should be responsible for ensuring that employees who that supervisor direct complete these assignments in a competent and timely manner. Indicia of such responsibility may be found in reviews, written and oral disciplines, and bonus plans for the putative supervisors.
- Specific examples in which the alleged supervisory power has been exercised. Ultimately, the Board should examine specific examples where alleged independent judgment has or is expected to be exercised in order to determine whether independent judgment in fact is has been used.

2. What is the difference, if any, between the terms "assign" and "direct" as used in Sec. 2(11) of the Act?

The terms "assign" and "responsibly to direct" can and do have a distinct meaning. The term "assign" ordinarily refers to setting an employee's hours, shift, department, or overall job assignments. Ordinarily, such assignments do not involve detailed oversight of the performance of individual tasks by the supervisor, but when made with the requisite degree of discretion and judgment, remain so fundamental to an employee's

conditions of employment as to make the individual who made the assignments a supervisor within the meaning of the Act.

In contrast, the term "direct" ordinarily relates to an ongoing active oversight of the performance of the individual tasks that have been assigned. Although the two terms merge at the margins, in most circumstances, it is relatively straightforward to distinguish which is involved.

3. What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?

Congress used the term "responsibly" to modify "direct" in order to make clear that a true supervisor must ultimately be responsible for the work product of the person he or she directs, not simply a mentor or more senior employee who gives advice, training, or general guidance to another employee. With respect to individuals who direct the work of others, the notion of responsibility distinguishes true supervisors from those who merely give general direction and guidance, but are not held accountable for ensuring that the work of others is completed in a satisfactory manner. For example, many nonsupervisors help integrate the work of a team of employees by directing the order in which certain tasks are done, by stopping or starting a process or line, or by giving some limited direction of how the employees should coordinate their tasks. Such traffic cops have an important role to play, but no one would suggest that these individuals are supervisors. Similarly, more senior employees are used to train or mentor newer employees. Again, however, they are not supervisors.

The Board has explored the legislative history and some of the nuances of this distinction in considerable depth in Providence Hospital, 320 N.L.R.B. 717, 728-29 (1996). We believe that the Board should adhere to the interpretations and guidance it articulated there.

4. What is the distinction between directing "the manner of others' performance of discrete tasks" and directing "other employees" (emphasis in original)? Kentucky River, at 720.

The Supreme Court in Kentucky River recognized that "the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as § 152(11) requires." 29 U.S.C. §152(11). The Court pointed out that the Board articulated such a distinction, citing Providence Hospital, 320 N.L.R.B. 717, 729 (1996). We believe such a distinction is important and that the Board should continue to adhere to it.

Although not well developed in the Board's jurisprudence, such a distinction necessarily turns on the manner in which an alleged supervisor acts. On one hand, a non-supervisor may lay out a specific set of tasks or procedures to be performed or give detailed instructions regarding how to perform a given set of tasks without overseeing or being responsible for the actual implementation of that plan by other employees. Thus his role is not supervisory no matter how much judgment and discretion he exercises. In contrast, a qualifying supervisor directing other employees will be more directly involved in managing and interacting with the employees who will implement the plan, not simply relying on them to implement such plans or instructions.

At bottom the essence of the supervisory function is the manner in which a putative supervisor interacts with other employees. A true supervisor will not simply layout the details of the task to be done, he will have continued oversight responsibility over the actual performance of the tasks and be accountable to ensure that they are implemented correctly.

The Court of Appeals decision in Kentucky River contains a succinct illustration of this concept in its discussion of rehabilitation counselors. In the course of their duties, rehabilitation counselors exercised a considerable amount of discretion in evaluating patient needs and developing an appropriate treatment plan. Kentucky River Community Care, Inc. v. NLRB, 193 F. 3d 444, 454 (6th Cir. 1999). A group of rehabilitation assistants then utilized those plans to treat patients. Kentucky River argued that the counselors thereby were supervisors of the rehabilitation assistants who implemented these plans.

The Sixth Circuit rejected this argument. It found that counselors and assistants enjoyed a complimentary relationship, characterized by give-and-take discussions of what must be done, not a supervisory relationship in which counselors were responsible for monitoring performance and ensuring that assistants performed their duties correctly. Moreover, it pointed out that the counselors did not assign assistants to particular patients and that the assistants reported to a Treatment Assistant or Treatment Coordinator. Id. at 455. The Board should follow this analysis.

5. Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? What is the distinction between a supervisor's "independent judgment" under Sec. 2(11) of the Act and a professional employee's "discretion and judgment" under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?

The courts and the Board have long pointed to a tension between the Board's treatment of professionals and its exclusion of supervisors. But much of that tension has resulted from the Board's past efforts to carve out tests for professional supervisors that are different and more stringent than the supervisory tests that apply to nonprofessionals. After Kentucky River, NLRB v. Yeshiva University, 444 U.S. 681 (1980), and NLRB v. Health Care & Retirement Corp. 511 U.S. 571 (1994) it is now clear that the Supreme Court has rejected that approach in its entirety and that the Board must now use the same test to determine supervisory authority, regardless of whether the putative supervisor is professional and non-professional. By separating the analysis of supervisory status and professional status, the Board is likely to find that most of the tensions it has identified in the past will evaporate.

With respect to supervisory status, the Act requires the Board to focus on whether a putative supervisor is exercising independent discretion and judgment with respect to one of the supervisory functions enumerated by Congress. By making this determination without regard to whether the discretion exercised by the putative supervisor is informed by his or her professional judgment or knowledge, the Board can make accurate and predictable judgments that minimize any tension with the definition of professionally.

To be sure, there is some overlap between the "independent judgment" exercised by a supervisor and the "discretion and judgment" exercised by a professional employee. In both cases, the judgments being made may be informed and guided by the individual's professional training and experience. But the difference is the purpose to which the professional's discretion and judgment is put. A true supervisor will exercise his or her professional (or nonprofessional) discretion and judgment, at least in part, to perform one of the twelve enumerated functions set forth in the Act's definition of a supervisor. A non-supervisory profession will still use his or her discretion and judgment to perform work, but will use it exclusively to perform nonsupervisory tasks.

> The Board has asked whether there are "entire group[s] of professional workers" who "may be deemed supervisor based on their role with respect to less-skilled workers." In the abstract, the answer is yes. Where a group of professional employees is exercising independent judgment for an employer to perform an enumerated supervisory function with respect to another class of less skilled employees, then the entire group may be supervisory.

6. What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?

The Board distinguishes (1) discrete periods of supervisory service, e.g., a project or a season from (2) regular, recurring or substitute service, e.g., one day each week, from (3) exercising authority over unit employees while performing both supervisory and non-supervisory duties during the same work period. Compare Great Western Sugar Co., 137 N.L.R.B. 551 (1962); Westinghouse Electric Corp., 163 N.L.R.B. 723 (1967), aff'd 171 N.L.R.B. 1239 (1968), enf'd 424 F. 2d 1151 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970); and Carlisle Engineered Products, 330 N.L.R.B. No.189 (2000) citing

Canonie Transportation, 289 N.L.R.B. 299 (1988) and Aladdin Hotel, 270 N.L.R.B. 838 (1984).

With respect to seasonal or project supervisors, the Board looks at whether the alleged supervisor spends the bulk or 50 percent or more of his working time over a 12 month period performing non-supervisory duties. See Westinghouse Electric Corp., supra. at 727. For the remaining categories, the Board considers whether the "part-time", "temporary" or "substitute" supervisor or the "working supervisor/working foreman" spends a "regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant." See Canonie Transportation, supra.; Aladdin Hotel, supra, at 840; Doctor's Hospital of Modesto, Inc., 183 N.L.R.B. 950, 951 (1970). Where substitution is regular and recurring, "substantiality" has been found (or would have been found assuming supervisory authority present) where: (1) ten of forty hours each week, (2) two days per week, (3) fifteen percent of weekly worktime, (4) one day every two weeks, (5) two out of eight working days, (6) average of at least times per month over the past three months. See Aladdin Hotel, supra at 840.

The Board should quantify a bright-line minimum standard to define "substantiability." While the statutory definition speaks only to "having authority" which could be satisfied with a very minimal percentage, a ten percent standard exceeds recognized statistical insignificance. The "regularity" requirement, (whether focusing on frequency, recurring and/or an average over six months, or a year), combined with "likelihood" or "forseeability" or "reasonable expectancy" of continuing into the future

satisfies the "having authority" requirement while also supporting a 10 percent minimum standard.

7. **In further respect to No. 6 above, what, if any, difference does it make that persons in a classification (e.g., RNs) rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?**

None. Section 2(11) defines "supervisor" as "any individual having [supervisory] authority . . . or effectively to recommend [supervisory enumerated actions]." If an individual indeed possesses supervisory authority then the issue becomes the focus of Number 6 above – i.e., does the individual perform such supervisory tasks regularly and substantially or only sporadically and insignificantly. The fact that some or all persons in a classification could be deemed supervisors cannot change the statutory definition. In such a case, undoubtedly much attention first will be placed on the initial screens – (1) whether the individual(s) hold authority to engage in or to effectively recommend any of the 12 listed functions, (2) whether the exercise of such authority requires independent judgment and is not merely routine or clerical, and (3) whether such authority is held in the interest of the employer. While the policy concern over excluding individuals from the Act's protections is not debatable, neither can the Board circumvent statutory language to effectuate a particular result.

8. **To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulatory work teams?**

In Crown Cork & Seal Co., 334 N.L.R.B. No. 92 (2001), the Board considered whether employee committees were unlawful employer dominated labor organizations.

See, Electromation, Inc., 309 N.L.R.B. 990 (1992), enf'd. 35 F. 3d 1148 (7th Cir. 1994). Because each committee was delegated "the authority to operate the plant within certain parameters," there was no "dealing with," and therefore, labor organization status was not present. Crown Cork, supra, at 3. The Board noted that each committee exercised group authority by consensus, management committee members had no greater authority than other employee members, the groups' authority was unquestionably managerial, and their authority as exercised within stated parameters was comparable to that of a frontline supervisor. Id.

The issue of "shared authority" was examined in Yeshiva, supra, at 861. Although faculty were unquestionably professionals and entitled to the benefits of collective bargaining,

> [they], like other employees, may be exempted from coverage under the Act's exclusion for 'supervisors' who use independent judgment in overseeing other employees in the interest of the employer, or under the judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy. Id. at 862; citing NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

Like the Yeshiva Court's analysis, the Board must examine what the team or group does, how it goes about performing its delegated duties/responsibilities, and the nature of the authority delegated. A group or team exercising full delegated authority can be exempt from the Act's coverage as "unquestionably managerial" or "comparable to . . . frontline supervisor[s] in the traditional plant setting . . . . " Crown Cork, supra, at 3.

9. What functions or authority would distinguish between "straw bosses, leadmen, set-up men, and other minor supervisory employees," Whom Congress intended to include within the Act's protections, and "the supervisor vested with "genuine management prerogatives." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting Senate Report No. 105, 80th Cong. 1st Sess., 4 (1947).

The Supreme Court in NLRB v. Bell Aerospace Co., 416 U.S. 267, 281 (1974) noted that the Senate viewed "straw bosses" and similarly functioning employees as having only "minor" supervisory duties and, therefore, should be considered covered Section 2(3) employees and not exempt Section 2(11) supervisors. The tests for distinguishing are not based on job title but concern the factors discussed in Numbers 1-4, above. Namely, for any particular individual, does he/she hold authority to engage in any of the 12 listed supervisory functions, is the exercised authority (including the authority to effectively recommend) other than merely routine or clerical, and is the authority held in the interest of the employer. Invariably, exempt supervisory status will not be found where recommending is illusory, not followed, or the degree of authority is so circumscribed that the focus is task, performance or completion, or routine (no demonstrable effect or wages, hours or terms and conditions of employment) or clerical.

10. To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work, etc. – in determining supervisory status?

Secondary indicia, including ratios, differences in terms and conditions, and ostensible or apparent authority, have been and should continue to be considered. Since the Act requires, in part, only the holding of authority or recommending authority of any one of the enumerated 12 supervisory functions, it serves the analysis to examine

secondary indicia to be more certain of an inclusion or exclusion decisional outcome especially where only one or a very few functions are claimed or commendatory.

III. CONCLUSION

The United States Supreme Court has provided repeated guidance regarding Section 2(11). Recognizing that each case turns on its own facts, the Board should provide the public and parties with specific tests or factors including minimum standards along with examples applying such criteria. Where workplace developments result in a "sea change" under existing statutory language and articulated interpretative tests or factors, it is the job of Congress to address the core, qualifying definitions of coverage or exclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kenneth F. Sparks, an attorney, certify that on September 17, 2003 he caused the Brief of *Amicus Curiae* Covenant HealthCare System to be served by overnight delivery on:

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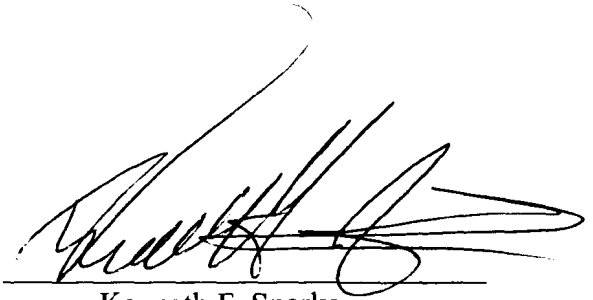

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